Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1998

FRANCES McPHAIL, as Administratrix of the Estate of David Harry McPHAIL, Deceased,

Petitioner,

vs.

MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC., MITSUBISHI MOTOR SALES OF AMERICA, INC. and VALUE RENT-A-CAR,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED

I. Does the National Traffic and Motor Vehicle Safety Act of 1966, as amended 49 U.S. C. 30101, *et seq.*, require car manufacturers to design and build safer cars, or are the lower courts' correct in transferring this responsibility to the bailees of defective rental cars?

II. Where plaintiff's experts, who are licensed engineers and experienced in accident reconstruction, state that an accident resulted from the failure of a wheel assembly containing a cast iron yoke, and that using steel would be more appropriate and safer, were the Courts correct in granting the defendants a summary judgment?

III. Where an expert's report has been disclosed under Rule 26(a)(2)(B) or (C), does the statement have to be notarized to be considered in responding to a Rule 56 Motion?

IV. Does Rule 26(a)(2)(C) FRCP preserve the right of rebuttal to the plaintiff and provide that plaintiff has a right to contradict or rebut evidence and issues identified by the defendant under paragraph 26(a)(2)(B)?

V. Where defendants have either failed to produce legible documents in making disclosures and, after plaintiff's expert reports are made, produce legible copies, is it an abuse of discretion for a Judge, to refuse plaintiff an opportunity for further investigation and rebuttal testimony?

VI. Do the Federal Rules of Evidence require consideration of out of court statements made by a deceased person and by witnesses who are hostile?

VII. Where a contract is involved in which warranty, or other contractual agreements were made should Federal Courts apply the law of the state in which the act of negligence occurred, or of the state in which the resulting accident happened, in determining issues of breach of implied warranty of suitability for the purpose for which a vehicle was rented?

VIII. In deciding tort liability for a wreck in Alabama caused by a defective rental vehicle, where Federal Courts decide AMELD (strict liability) is inapplicable, should they apply Alabama's negligence and bailment law?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. Mitsubishi Motor Manufacturing of America, Inc., Mitsubishi Motor Sales of America, Inc., and Value Rent-A-Car all appear to be subsidiary companies of a larger company, often referred to as "Mitsubishi". However, under 49 CFR § 579.5 the manufacturer of a vehicle is responsible for any safety related defect determined to exist in a vehicle or in any item of original equipment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Frances McPhail, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals denying rehearing en banc is not yet entered in the Federal Reporter, it is reproduced in the Appendix filed herewith at Appendix A.

The opinion of the Court of Appeals denying rehearing is not yet reported and is reproduced at Appendix B.

The Opinion of the Court of Appeals affirming the District Court is noted at 141 F.3d 1190, and is reproduced at Appendix C.

The Opinion and Judgment of the District Court are not noted in the Federal Supplements and are reproduced at Appendix D.

The Order of the District Court affirming the Magistrate in Striking portions of Plaintiff's discovery is reproduced at Appendix E.

The Order of the District Court striking Plaintiff's Exhibit 1 is Reproduced at Appendix F.

Plaintiff's Expert Reports (Relevant portions) are reproduced at Appendix I.

STATEMENT OF JURISDICTION

The Court of Appeals entered it's judgment denying rehearing on the 16th day of July, 1998. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S. Constitution, 7th Amendment

[Trial by Jury in Civil Cases]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Code of Alabama, § 7-2A-106

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which
(a) the lessee resides at the time the lease agreement became enforceable

* * *

(c) the lease is executed by the lessee, the choice is not enforceable.
* * *

Code of Alabama, § 7-2A-212 and Code of Florida § 680.212

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as:
(a) Pass without objection in the trade under the description in the lease agreement.
* * *
(c) Are fit for the ordinary purposes for which goods of that type are used.
* * *

(3) Other implied warranties may arise from the course of dealing or usage of trade.

Code of Alabama, § 7-2A-213 and Code of Florida § 680.213.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

Code of Alabama, § 7-2A-214

* * *

(5) * * * Nothing in subsection (2) or subsection (3)(a) or in § 7-2A-215 shall be construed so as to limit or expand the lessor's liability for damages for injury to the person in the case of consumer goods.

49 CFR § 579.2

The purpose of this part is to facilitate the notification of owners of defective and noncomplying motor vehicles and items of motor vehicle equipment and the remedy of defective and noncomplying vehicles and items of equipment, by equitably apportioning the responsibility for safety related defects and non compliance, with Federal motor vehicle safety standards among manufacturers of motor vehicles and motor vehicle equipment.

49 CFR § 579.5

(a) Each manufacturer of a motor vehicle shall be responsible for any safety related defect or any noncompliance determined to exist in the vehicle or in any item of original equipment.

STATEMENT OF THE CASE

Plaintiff filed a Rule 27 Action in Mobile County, Alabama, against Value Rental, charging that a car rented by the deceased, David McPhail, was defective in construction or design. She charged that these defects caused the steering of the car to fail; the car's yoke was made with material which would not withstand normal and expected impacts and keep the tires in place; and that implied warranties were breached by renting the car with one or more design, manufacturing, or maintenance defects. She also charged wantonness and negligence. Her son, David McPhail, was killed in a wreck when the car went out of control. Mitsubishi intervened claiming to be the owner of the vehicle.

McPhail later filed a wrongful death action including theories of negligence in manufacture or maintenance of the rental car; AMELD (a version of products liability which requires proof of fault); and breach of implied warranty in a lease made in Fla.

The case was removed to the U.S. District Court which ordered that Rules 26(a)(1)(A-D) and 26(a)(2) F.R.C.P. be complied with by Plaintiff tendering expert disclosures within 30 days after discovery cut off and the Defendants within 30 days thereafter.

Plaintiff retained accident reconstruction experts who submitted reports.

Owen Posey stated that the wreck was caused by the failure of the right rear yoke and wheel assembly. Fred Lewter stated that the wreck was caused by the failure of the right rear yoke and wheel assembly and that the knuckle used was not appropriate as it was made of nodular cast iron rather than steel. Billy Mims, stated that the brakes on the vehicle also failed. M.D. Anderson stated that the accident was caused by failure of the right rear wheel assembly. Plaintiff's experts' reports stated that the failure of the right rear wheel assembly was the cause of the accident. Extracts of these reports are set out in Appendix I.

Defendants offered no evidence of any unusual pre accident occurrence which could have caused the yoke to break prior to the accident, and while the car was in McPhail's possession, nor that anyone damaged or altered the vehicle between the time that it was rented to the deceased and the accident. Defendants' experts asserted that the wheel broke as a result of the accident. None of Defendants' experts had been involved in the design of the yoke, or the weld joint holding the shock absorber in place, and all design work was done in Japan by another company.

Among documents relied upon by Plaintiff's experts were laser prints furnished by Defendants which Defendants represented were as good as regular photos. Some had been made shortly after the accident, and before Plaintiff's experts took their photos. Some laser photos of the scene furnished by Defendants were of extreme poor quality. During the deposition of Plaintiff's experts it was disclosed that Defendants had more legible copies of some of the pictures. These disclosed that instead of the three tire marks photographed and measured by Plaintiff's experts, there were four skid marks with the fourth skid mark made by the right rear tire being out of alignment with the other tires, supporting Plaintiff's claim that the wheel assembly failed causing the car to leave the roadway.

Upon being shown these additional documents Plaintiff's expert, Lewter, testified that re examination of the car was needed. Plaintiff obtained permission from the Defendants to reexamine the vehicle and Fred Lewter was accompanied by his associate Al McEachern, whose vitae had previously been given to Defendants, and who had furnished info to defendants in the absence of Lewter.

After inspection of the car, conferring with Lewter, reviewing Plaintiff's other experts' reports, reviewing the Defendants' experts' reports, and the

photos, McEachern wrote a report which was submitted within thirty (30) days after the Defendants' experts submitted their reports. This report contradicted claims made by the Defendants' experts who were claiming the right rear yoke failed when the car flipped or it hit a tree. He stated that the way the car was designed, the assembly could have been defective for a while and failed causing the accident. This reiterated a statement that had been made by Plaintiff's expert, Posey, in his deposition.

When David McPhail rented the car from Value in Florida and drove to Mobile, Alabama, he complained the car was difficult to steer, it made popping noises, that when he applied the brakes the radio and lights would dim, and that the car did not seem right to him. He complained to his mother, his girlfriend, Frankie Young, and to Frankie's fiancee. After the accident Young's fiancee told the navy investigator and Mrs. McPhail about these complaints.

Mrs. McPhail was a passenger in the car and she heard a popping noise and noted the lights going dim when the brakes were applied. After the wreck she was told by Frankie Young that he had problems when he drove the car and that it was difficult to steer. She was also told by a Navy investigator of defects found in investigating the wreck. Mrs. McPhail testified that while complaining about the car David McPhail felt safe in driving it.

It was further disclosed that Frankie Young had filed suit against her and her husband after the wreck, and had married his fiancee. Both he and his fiancee denied any knowledge of defects in the car, and at one point he even denied driving the car. The finance's deposition was inconsistent with statements made by her in an official accident investigation run by the U.S. Navy.

A revised report was made by Anderson after he had examined the new photographs, McEachern's report, and defendants' experts' reports. He repeated that the cause of the accident was the failure of the right rear wheel assembly.

The District Court threw out McEachern's statement and also apparently gave no weight to the Plaintiff's other experts testimony and reports that the failure of the wheel assembly caused the accident.

The Court discarded McPhail's negligence and warranty claims. It never addressed Plaintiff's contention that the vehicle was rented in Florida,

and her citations of authority showing that certain warranties or expectations were created in Florida, which remained applicable when the car was driven to Alabama, and that Alabama's Bailment Law imposed liability for failure of a short-term rental car being used for the purpose for which it was rented.

On appeal, the District Court was affirmed without oral argument. The 11th Circuit upheld the lower Court's assertion that the Plaintiff must show that alternate designs were available to the Defendants which would have made the vehicle safer. Neither Court addressed the Plaintiff's evidence that steel was more appropriate for the peculiar design used by the defendants, or commented on the contention that renting out a defective car was negligence. A Petition for Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

I

The National Highway Traffic and Motor Vehicle Safety Act as amended 49 U.S.C. 30101, *et. seq.*, requires car manufacturers to design and build safer cars. The lower courts erred in transferring this responsibility to bailees of defective cars.

49 U.S. Code § 30101, *et seq.*, and 49 CFR § 579 impose on car manufacturers a duty to design and build safer cars. The rulings by the Lower Courts allow a State to transfer this duty to consumers even though there are numerous suspension designs on the road and the consumer has no way to submit his designs to numerous tests and prove they would pass the Federal Act's standards.

Unless these rulings are addressed and reversed by this Court car manufacturers can use their wealth and power in a state by state effort to defeat responsibility for defectively designed vehicles even though there are already numerous suspension systems on the market. No plaintiff has the resources to conceive, test out and prove to the Secretary the safety or feasibility of a design he comes up with to prove a design defect. In effect the judges and juries become the car's designers.

Some cases which hold contrary to the assertion by the District Court

and the Circuit Court are *Dawson v Chrysler Corporation*, 630 Fed.2d 950 (3rd Cir. 1980), where it was held the judge decided the issue of duty owed by the manufacturer and the jury decides defect and proximate cause; *Lowe v General Motors Corporation*, 624 Fed.2d 1373 (11th Cir. 1980); *Townsend v General Motors Corporation*, 642 So.2d 411 (Ala. 1994); *Atkins v American Motors Corporation*, 335 So.2d 134 (Ala. 1976); *Darcey v Honda Motors Company, Ltd.*, 655 Fed.2d 650 (5th Cir. 1981); *Larson v General Motors Corporation*, 391 Fed.2d 495 (8th Cir. 1968).

Recent Alabama Supreme Court cases have adopted the standard that a good is defective if it does not meet the reasonable expectations of the consumer. *Mueller Co. v Trambeam Corp.*, 693 So.2d 1380 (Ala. Civ. App. 1997); *Graham v Sprout-Waldron and Co.*, 657 So.2d 868 (Ala. 1995). Defendants contend that Plaintiff must tell defendants how to make the product meet reasonable expectations. Alabama does not have such a requirement. In *Moore v Kawasaki Motors Corp. USA*, 703 So.2d 990 (Ala. Civ. App. 1997) the Court declared at page 993, that while any assessment or reconstruction of what caused an accident is necessarily speculative, that alone does not entitle a defendant to Summary Judgment and cited *Peters v Calhoun County Commissioners*, 669 So.2d 847, 851(Ala. 1995). Also see the recent case of *Taylor v. General Motors Corp*, 707 So.2d 198 (Ala.1997), in which a plaintiff had settled with a tire manufacturer, and was allowed to go to the jury under AMELD where a rod in his car allegedly failed. In reviewing a jury verdict for defendant the Court made it clear that Ala. follows *Restatement (Second) of Torts, § 402A*. Thus McPhail could "go to the jury" on showing that when the car was rented it was in an unreasonably dangerous condition, not fit for its expected use because it either had a defective part or a part made with an inappropriate material which failed. These cases only require the showing of a defect, not what caused the part to fail.

If Alabama requires that a plaintiff tell the defendant how to make rental cars safer that law would be preempted by the Federal Act. 49 USC § 30103; *Garcia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (C.A.1997); 49 CFR § 579.5.

II

Where plaintiff's experts, who are licensed engineers, and experienced in accident reconstruction state that an accident resulted from the

failure of a wheel assembly containing a cast iron yoke and that using steel would be more appropriate and safer the Lower Courts erred in granting the defendants Summary Judgments.

Plaintiff's experts, four of whom are engineers, reported, both before and/or after being furnished additional data and defendants' experts' reports, that the sole cause of the accident was the failure of a right rear wheel assembly, part of which, called a yoke, was made from cast iron rather than steel.

Plaintiff's metallurgist stated that steel would have made the part safer especially in the use of elongated parts and thus showed a safer design was available. This was repeated in McEachern's Report. In studying some of defendants' literature both experts noted that Mitsubishi had just changed from using gray iron to nodular cast iron. Under the reasonable expectation test it does not matter whether the use of cast iron was a manufacturing or design defect. See *Reynolds v Bridgestone Firestone, Inc.*, 989 F.2d 465 (11th Cir 1993) citing Alabama cases.

This case should be reversed with mandate for the Courts to allow a jury to determine whether Mitsubishi is liable if it used a cheaper, less effective part in its vehicles which failed when put to the car's expected use, and allow the jury to weigh the experts' evidence. *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498, cert. granted 108 S.Ct. 1073, 485 U.S. 903, 99 L.Ed.2d 233, cert. dismissed, *Pratt v. Whitney Canada, Inc. v. Rainey*, 108 S.Ct. 1761, 485 U.S. 994, affirmed in part, reversed in part, 109 S.Ct. 439, 488 U.S. 153, 102 L.Ed.2d 445, on remand 868 F.2d 1531; and *Taylor v. General Motors Corp.*, supra.

III

Where an expert's report is disclosed under Rule 26(a)(2)(B) or (C), it does not have to be notarized to be used in responding to a Rule 56 Motion.

The rulings by the lower courts claim that an expert's statement properly prepared under Rule 26(a)(2) can be rejected when tendered in response to a Rule 56 Motion for Summary Judgment if the statement is not notarized in affidavit form. Rule 26 only requires that the expert's report be prepared and signed by him. *Rainey v. Beech*, supra.

A Motion for Summary Judgment contends that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. This carries Rule 11 implications when the moving party knows that there are genuine issues and he is not entitled to judgment as a matter of law. Also a Motion for Summary Judgement cannot be granted, even if unopposed if a jury could reasonably reject or disregard the contents of the movant's affidavit.

Defendants knew that the reports by Plaintiff's experts showed that the cause of the accident was the failure of the rear right wheel assembly which caused the car to leave the road. The prima facie expert witnesses were all examined in depositions and the basis for their claim that the yoke failed were examined by Defendants' counsel and remained the same.

The Defendants then tendered experts' reports which claimed that the use of cast iron was appropriate and that the knuckle did not break until the vehicle flipped or had hit a tree. Plaintiff offered a rebuttal report from Anderson and a report by Al McEachern, who examined the vehicle after the Defendants had taken the deposition of the other witnesses. McEachern had been previously identified to the defendants several months earlier as assisting Lewter. His signed report was rejected by the Court despite full compliance with Rule 26(a)(2)(C).

Although there remained evidence in the file which sustained Plaintiff's case, the Courts treated McEachern's report as a sine qua non to Plaintiff having made out a prima facia case of failure of the wheel assembly. The issue, of whether an expert's report has to be sworn, affected this case and will effect the outcome of numerous cases and should be reviewed.

IV

Rule 26(a)(2)(C) preserves the right of rebuttal to the plaintiff and allows plaintiffs the right to contradict or rebut evidence and issues identified by the defendant under Rule 26(a)(2)(B).

The District Court treated it's pretrial order as limiting the Plaintiff to filing only expert reports which were filed within thirty (30) days after the close of discovery. It treated efforts by the Plaintiff to file rebuttal expert

reports under Rule 26(a)(2)(C) as violating Rule 56 and struck or disregarded the reports. The Eleventh Circuit upheld this ruling.

The clear wording of Rule 26(a)(2)(C) shows that the drafters intended to preserve the Common Law right of rebuttal which plaintiffs are deemed to have. It states that if the report is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), it has to be filed within thirty (30) days after the disclosures made by the other party.

The Rule requires both parties to supplement when required under Rule 26(e)(1). This imposes a duty to supplement or correct a report to include information thereafter acquired. It states that under subdivision 26(a)(2)(B) the duty extends both to the information contained in the report and to information provided through a deposition of the expert and any additional or other changes to this information shall be disclosed by the time parties disclosures under Rule 26(a)(3) are due.

The rulings of the lower courts mean that Plaintiffs no longer have an absolute right of rebuttal or the right to contradict evidence on a subject matter identified by the other party after the prima facie expert reports have been filed. This is contrary to the intent not only of the FRCP, but to the Rules of the Common Law as adopted into the United States Constitution via the Seventh (VII) Amendment.

Any limitations on the right to offer rebuttal testimony, or proof, warrants review by this Court.

V

Where defendants fail to produce legible documents in making disclosures, and after plaintiff's' expert reports are filed, produce legible copies, it is an abuse of discretion for the Judge, who had restricted plaintiff's discovery, to refuse her an opportunity for further investigation and rebuttal testimony.

Plaintiff attempted to obtain additional data from Defendants through discovery after Defendants made initial disclosures. Defendants objections and refusal to answer were upheld by the Magistrate and his ruling affirmed

on appeal to the Judge, which essentially left Plaintiff with only the documents which Defendants elected to produce. The Defendants, in making Rule 26 disclosures either willfully or inadvertently produced laser prints, which were represented to Plaintiff's counsel as equivalent in quality to pictures that could be made through regular photo process. Some of the photos appeared to be either over-exposed or out of focus which is a common problem in photography. Plaintiff's Experts prepared their reports, based in part upon what details could be discerned from those photos, and on subsequent site photos taken at a later date by one of her experts which showed only three tire marks on an intersecting road and in the grass prior to the car flipping. During examination of Plaintiff's experts, Defendants disclosed they had clear copies of some of the previously unclear photos and referred to them in examining plaintiff's experts.

On being shown the photos Mr. Fred Lewter testified that further examination of the car was necessary. Plaintiff requested the clearer photos from the defendant and they were furnished. One photo showed a fourth tire skid mark which was turned at a different slip angle from the other wheels. An examination of the car was done Mr. Lewter and McEachern. McEachern's report was signed and submitted. A copy of the photograph was also submitted. These were in rebuttal of claims by the defendant. Mr. Anderson, who had previously been deposed, examined the defendant's experts' reports and submitted a new report which again stated that the failure of the knuckle caused the accident.

McEachern's report was filed within thirty (30) days of the defendants' reports. The photograph was also submitted within 30 days. Although the judge allowed an extension of time for Anderson to file his amended report, neither the photo or the reports were discussed by the Court in ruling on the Motion for Summary Judgment. The Court specifically struck McEachern's report.

Even though Plaintiffs' other experts had clearly stated and testified that the accident was caused by the failure of the right rear wheel assembly, after striking McEachern's report, the Court quickly ruled against the plaintiff demeaning the substance of the reports and testimony by those experts.

The District Court refused plaintiff access to the data which caused Mitsubishi to issue Technical Service Bulletins addressing car problems similar to those described by McPhail.

It is an abuse of discretion for a judge to refuse the Plaintiff an opportunity to further investigate and offer rebuttal testimony or address issues raised by the Defendants in their Rule 26 experts' reports. The 11th Circuit affirming the District Court, allows defendants to sit back and not raise issues in products liability cases which they intend to rely on until their experts finally submit their reports well after the plaintiff's experts have made their prima facie reports and then move for summary judgment claiming those issues could not be then addressed by the plaintiff nor was the plaintiff entitled to new discovery. These rulings will effect the outcome of future cases in which expert reports are necessary in the resolution of the issues.

VI

The Federal Rules of Evidence allow use of out of court statements made by a deceased person and by hostile witnesses.

Rule 803(1) FRE provides for admission of a statement made by a declarant explaining an event or condition made while he was perceiving the event or shortly thereafter. Rule 804(a)(3) FRE allows evidence of a deceased persons relevant statements when he is dead. Rule 807 also makes McPhail's statements admissible.

There was evidence the deceased had made statements that there were problems with the car affecting its steering and road handling prior to the wreck, beginning the day he rented the vehicle from Value and he continued complaining about steering and other problems.

Use of testimony of pre-accident problems with a car in proving liability was upheld by the Alabama Court in the case of *Teague v. Adams*, 638 So.2d 836 (Ala. 1994). The court held that type of testimony created a question of fact as to whether the accident was caused by a mechanical problem and was evidence of such weight and quality that fair minded persons in the exercise of impartial judgment could reasonably infer that mechanical problems with the car contributed to or caused the accident.

Since Frankie Young had commenced a suit against Plaintiff which was pending, both he and his wife were fairly treated as hostile witnesses. Since both testified inconsistent with statements they made earlier Rule 801(d)

FRE makes Frankie Young's statements and that of his wife admissible to impeach their testimony as offered by the defendants in support of their Motions For Summary Judgment. Under Rule 703 FRE they are admissible to show the basis on which Experts premised part of their investigation. Under Rule 801(d) FRE statements Mrs. Young made to the Navy Investigator which are part of his official report are proper on substantive issues as well as impeachment. *Rainey v. Beech*, supra. It is reversible error to disregard such testimony.

VII

Where there is a contract, in which warranty or other contractual obligations were made, Federal Courts should apply the law of the state in which the act of negligence occurred, which resulted in an accident, in determining issues of breach of contract or implied warranty of suitability for the purpose for which the car was rented.

One issue in this case involves Common Law negligence. Under Alabama Law, if a defendant rents a defective car to someone, it is liable if that vehicle causes an injury. *Al De Ment Chevrolet Co. v Wilson,* 42 So.2d 585 (Ala. 1949) § 32-5-212 Code of Ala.; *Teague v Adams,* 639 So.2d 836 (Ala 1994); *Economy Fire and Casualty Company v Goar,* 551 So.2d 957 (Ala.1989); *Aircraft Sales and Service v Gant,* 255 Ala. 508, 52 So.2d 388 (Ala 1957).

Since Mitsubishi Motor Sales remained the owner of the car being rented by Value with Mitsubishi Motor Manufacturing doing the maintenance, if there was a defect in the car at the time it was rented, they stand in the same shoes as Value and are liable for any injuries caused by the defect. There are certain defenses that are available. One is knowledge on the part of the plaintiff that he was in actual danger in using the product and another is using the product inconsistent with its intended use. However, there was no testimony to show that McPhail appreciated the danger. He relied upon Value's expertise in furnishing a product for his use. Code of Alabama § 7-2A-213 and § 7-2A-214(5). Plaintiff's experts stated that his driving did not contribute to or cause the accident.

If liability for injuries caused by a defective rental vehicle are in Contract and not in Tort the Alabama Courts would have applied Florida law. *American*

Economy Insurance Co. v Thompson, 643 So.2d 1350 (Ala 1994); Code of Alabama § 7-2A-106. The rule of Lex Loci rather than Lex Loci Delicti normally applies. Alabama's legislature has adopted a substantial contacts rule § 7-2A-106. A negligent breach of contract by renting a defective car occurred at the place of rental rather than the place of the resulting accident.

In Florida a bailor is liable who rents a vehicle whose wheels come off. *Amorosa v Samuel Friedland Family Enterprises*, 604 So.2d 827 (Fla. 1992); Also see *Lee v Hollywood Car and Truck Rental, Inc.*, 485 So.2d 843 (Fla 1985), where the Court applied res ipso locutur where a car burst into flames, but the Plaintiff was unable to determine why it did. In the case of *Moore v Kawasaki Motors Corp. USA*, supra, page 993, the court recognized that any assessment or reconstruction of what caused an accident is necessarily speculative. It allowed experts' testimony based on probabilities rather than certainties and cited *Peters v Calhoun County Commissioners*, supra.

The implied warranties were made in a contract made in Florida and the contract itself was subject to statutory and case laws of that State which govern the validity and effect of short term rental agreements. What the parties bargained for is determined by Florida Law when a car is rented in Florida to a driver driving and licensed in Florida. The mere crossing of a state line did not lower the reasonable expectation of McPhail as set out in *Amorosa v. Friedland*, supra.

Alabama cases now refer to reasonable expectations and application of this substantive law test is proper. *Mueller v. Trambeam Corp*. 693 So.2d 1380 (Ala.Civ.App. 1997); *Economy Fire and Casualty Co. v. Gore*, 551 So.2d 957 (Ala.1989). These cases apply a similar doctrine to Florida's and under Alabama law, the plaintiff is entitled to the reasonable expectation that the wheels of a car rented in Florida will not come loose when it is put to its reasonably foreseeable use, whether suing under negligence, breach of a bailor's responsibility or AMELD. Enforcing reasonable expectations created under a Florida Contract is consistent with Alabama's public policy, *Graham v. Spout Waldron*, 657 So.2d 868 (Ala.1995) and granting summary judgment was not appropriate.

VIII

In deciding tort liability for a wreck in Alabama, caused by a defective rental vehicle, where Federal Courts decide strict liability does not apply, they should address the parameters of Alabama's negligence law in deciding liability.

The Courts seem to accept defendants' argument that AMELD subhumed any Common Law negligence theories. In *Ford Motor Company v Burdeshaw*, 661 So.2d 236 (Ala 1995), the Court clearly stated that parties could proceed on negligence; implied warranty; and products liability. In that case the Court recognized that some parts of vehicles are supposed to last for the life of the vehicle and that their failure to do so is a defect.

If the courts were justified in rejecting Plaintiff's proof under AMELD they should have then looked at common law negligence for renting defective products. A person is liable in tort for renting a defective product in Alabama. *Aircraft Sales and Service v. Gant*, 255 Ala. 508, 52 So.2d 388 (Ala.1951); *Motor Terminal and Transportation v. Millican*, 244 Ala. 39, 12 So.2d 96; *Knowles v. Dark and Boswell*, 211 Ala. 59, 99 So. 312 (Ala.1924); *Saunders System Birmingham v. Adams*, 217 Ala. 621; 117 So.72 (Ala.1928).

The law established by these cases was left in place by the legislature, which, when it adopted warranty statutes relating to rentals, stated in § 7-2A-214(5) that those laws did not expand or limit a lessor's liability for defective consumer goods. The law of negligence in bailment should not have been blindly ignored by the lower courts in determining issues of tort liability in the wreck of a rental vehicle.

In Alabama (and in Federal Courts) a jury, not the judge, is free to accept the Defendants' version of disputed facts re the accident, if the court gives it instructions on all of plaintiff's theories. *Taylor v. General Motors*, supra, citing *Ala. Farm Bureau v. Jericho Plantation*, 481 So.2d 343 (Ala.1985).

CONCLUSION

The critical errors cited in this Petition for Certiorari show that the lower courts gave weight to only one side's version of contested facts and accepted as conclusive claims which juries were free to reject and warrant review by this Court. The lower courts interpreted pleading and evidentiary rules are inconsistent with well established law designed to assure the just disposition of cases brought before the courts.

This case, if followed by other courts, will nullify well defined and developed substantive law and rules of evidence, pleadings and procedure, unless they are reversed by this Court as the Lower Courts radically departed from Alabama substantive and Federal substantive and procedural Law.

The lower court holdings nullify important provisions of an Act of Congress, and threaten the right of response guaranteed to a party bearing the burden of proof by the Seventh Amendment of the Constitution.

The lower courts belittled Plaintiff and her proof and ignored her proof, without giving adequate and plausible reasons for doing so. Given the important nature of the substantive and procedural issues raised, Certiorari should be granted on any or all of the above issues, and the lower courts rulings corrected or affirmed so that other Courts can have clear substantive and procedural precedence and rules on which to rely in future cases.

Respectfully submitted,

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